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No. 78-1296

In the Supreme Court of the United States

OCTOBER TERM, 1978

VITO GIACALONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 588 F. 2d 1158.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1978. A petition for rehearing was denied on January 22, 1979 (Pet. App. A21). The petition for a writ of certiorari was filed on February 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether temporary detention of petitioner's automobile pending issuance of a search warrant was lawful.

2. Whether the magistrate erroneously refused to hear argument by defense counsel in opposition to the issuance of the search warrant.

3. Whether the trial court improperly interfered with the jury's deliberations.

4. Whether the trial court's refusal to excuse three jurors for cause deprived petitioner of a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1). Petitioner was sentenced to two years' imprisonment and a fine of $5,000. The court of appeals affirmed (Pet. App. A1-A20).

Petitioner was arrested at 4:41 p.m. on March 29, 1977, on a federal warrant charging him with operation of an illegal numbers business. At the time of his arrest, petitioner was about to enter his automobile, which was parked in the lot of the Southfield Athletic Club. The FBI agents who made the arrest seized petitioner's automobile and moved it to an FBI garage. The agents did not conduct a search of the car at that time.

A few minutes after petitioner's arrest, an FBI agent recognized petitioner's chauffeur inside the Club and overheard him say that if the police searched the car, "they [might] find the goddamn thing in there" (Pet. App. A2). A confidential informant (FBI-2) also overheard the driver tell petitioner, "[w]e've got to get that gun out of there right now" (*ibid.*). About two months earlier, another confidential informant (FBI-1) had informed the FBI that he had overheard petitioner state that he had recently installed a secret

compartment in his automobile (*id.* at A2-A3). The foregoing information was incorporated in an affidavit in support of an application for a warrant to search the car, and the warrant was issued.[1]

The car was then searched pursuant to the warrant and a secret compartment was discovered in the dashboard. This compartment contained a loaded Smith and Wesson revolver (Pet. App. A1-A3). Evidence at trial showed that the gun had travelled in interstate commerce. The parties stipulated that petitioner had previously been convicted of a felony.

ARGUMENT

1. Petitioner contends (Pet. 11-20) that his automobile was unlawfully detained pending issuance of the search warrant. The court of appeals correctly rejected this claim in a decision on which we essentially rely (Pet. App. A1-A6).

The court of appeals noted (Pet. App. A2-A3, A4, n.4) that, before petitioner was arrested and his car was seized, he had told a federal informant (FBI-1) that he had installed a secret compartment in his car and that there was a gun in his car. Thus, at the time petitioner was arrested and "the automobile was first detained * * * the government had probable cause to believe [the car] contained the hidden firearm."[2] (Pet.

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[1]The affidavit also recited previous occasions on which FBI-1 and FBI-2 had provided accurate information to law enforcement officials.

[2]Petitioner agrees that this evidence would constitute probable cause, but he suggests that it was "stale" (Pet. 19) because it was based on a conversation overheard two months prior to his arrest and the seizure of the car. Whether evidence that has been previously acquired remains sufficiently probative to establish probable cause depends, of course, on the particular facts of the case. *E.g., United States* v. *Steeves*, 525 F. 2d 33, 38 (5th Cir. 1975); *United States* v. *Rahn*, 511 F. 2d 290, 293 (10th Cir.), cert. denied, 423 U.S. 825 (1975) (probable cause to believe that a

App. A4). Since the agents had probable cause to believe the car contained evidence of a crime, and since the car and the evidence might well have been removed if the agents delayed taking action,[3] the agents were entitled either to

> seiz[e] and hol[d] [the] car before presenting the probable cause issue to a magistrate [or] * * * carr[y] out an immediate search without a warrant.

Chambers v. *Maroney*, 399 U.S. 42, 52 (1970). See also *South Dakota* v. *Opperman*, 428 U.S. 364, 367 (1976); *Texas* v. *White*, 423 U.S. 67 (1975); *Cooper* v. *California*, 386 U.S. 58 (1967).

2. Petitioner claims (Pet. 20-24) that the magistrate erred in refusing to hear defense counsel's argument in opposition to the issuance of the search warrant. Petitioner acknowledges (*id.* at 23), however, that there are no decisions requiring the magistrate to allow argument on behalf of private parties in warrant proceedings under Rule 41 of the Federal Rules of Criminal Procedure. There is thus no conflict among the circuits requiring further review in this case.

In any event, nothing in Rule 41 requires a pre-warrant adversary hearing. To the contrary, the Rule expressly contemplates that warrant applications will be

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firearm acquired two years previously would be found in the defendant's home). In this case, petitioner had been overheard to say that he had concealed a gun in his car. Presumably the purpose of concealing a gun in this manner is to assure its ready availability in the car for future use. It was thus reasonable to assume that the gun would probably be found in the car at the time of petitioner's arrest. There is, in any event, no need for the Court to review the factual application of the probable cause standard in this case.

[3]Petitioner's chauffeur was present at the time of his arrest and could have (and apparently would have) removed the car and concealed the handgun if the car had not been seized at that time. See Pet. App. A2.

decided in an ex parte hearing before the magistrate. Petitioner, of course, acknowledges (Pet. 24) that this is the accustomed practice under the Rule. Moreover, Rule 41(e) allows the defendant to challenge the warrant after its execution; there is thus no basis for any assertion that petitioner's substantial rights were affected by the application of ordinary procedures in this case. Assuming that the magistrate had discretion to allow adversary argument in the warrant proceeding under Rule 41, there are no extraordinary facts in this case suggesting that such discretion was abused by deferring the adversary presentation until after execution of the warrant pursuant to Rule 41(e).[4] Moreover, even if the magistrate abused his discretion in this regard, application of the severe sanction of the exclusionary rule, where there was neither constitutional nor statutory violation, would be inappropriate.

3. Petitioner contends (Pet. 25-38) that the trial court improperly interfered with the jury's deliberations. After two and one-half days of deliberation, the jury announced that it could not reach a verdict and asked the court for "guidance in the subsequent procedure." The court responded with a note to the jury stating, "Please continue your deliberations." Three hours later, the jury had still not reached a verdict, and the judge inquired whether the jury needed any further instructions on the law. The

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[4]In *United States* v. *Jacobs*, 513 F. 2d 564 (9th Cir. 1974), and *Perial Amusement Corp.* v. *Morse*, 482 F. 2d 515 (2d Cir. 1973), the courts upheld warrants to seize obscene films that had been issued after an adversary proceeding before the magistrate. The magistrate's discretion to conduct an adversary hearing in these cases was based on the need to avoid an ex parte prior restraint of speech. Petitioner's concealed handgun was not, of course, protected by the First Amendment. Nor were there any other special circumstances here requiring a pre-seizure adversary hearing before the magistrate.

jury requested the court to give more detailed instructions on the definition of "knowingly." The judge, after consulting with counsel, gave a supplemental instruction on this term (Pet. App. A14-A15, n.7). The court also gave the jury an *Allen* charge (CA App. 260-263). One hour later, the jury returned its verdict. The court then polled the jury. Each juror stated that he had not surrendered his opinion solely because of the opinions of his fellow jurors or for the purpose of returning a verdict (*id.* at 266-269).

a. Petitioner claims (Pet. 29-30) that providing the jury with supplemental instructions impermissibly denied him the opportunity to present effective argument to the jury because his counsel was not aware of the supplemental instructions at the time of his summation. It has long been recognized that the trial court has discretion to provide supplemental jury instructions to assist the jury by clarifying points of law. *E.g.*, *United States* v. *Rowan*, 518 F. 2d 685, 693 (6th Cir.), cert. denied, 423 U.S. 949 (1975); *United States* v. *Bolden*, 514 F. 2d 1301 (D.C. Cir. 1975); *Price* v. *Glosson Motor Lines*, 509 F. 2d 1033 (4th Cir. 1975); *United States* v. *Burkhart*, 501 F. 2d 993, 997 (6th Cir. 1974). There is nothing to suggest that this broad discretion was abused in this case. Moreover, counsel was not denied an opportunity to present argument to the jury on the basis of the supplemental instructions. The court offered counsel the opportunity to make a supplemental argument on the basis of the additional instructions; however, counsel declined this opportunity (CA App. 245).

b. Petitioner also contends (Pet. 35-36) that the *Allen* charge was improperly coercive. This Court has consistently denied review of similar claims (see, *e.g.*, *Lacey* v. *United States*, cert. denied, No. 77-1751 (October 2, 1978); *United States* v. *Carter*, cert. denied,

436 U.S. 956 (1978); *Dyba* v. *United States*, cert. denied, 434 U.S. 830 (1977); *Perez-Vega* v. *United States*, cert. denied, 424 U.S. 970 (1976)), however, and there is no reason for a different result here. As the court of appeals stated (Pet. App. A18), the trial judge's statement approximated the instruction contained in 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* §18.14 (3d ed. 1977), which was implicitly approved by this Court in *Kawakita* v. *United States*, 343 U.S. 717 (1952).

Petitioner notes (Pet. 36) that a portion of this instruction informed the jury of the expense involved in trying a lawsuit and specifically that retrial of the instant case would be expensive. However, unlike the numerous references to the expense of trial in *United States* v. *Harris*, 391 F. 2d 348 (6th Cir.), cert. denied, 393 U.S. 874 (1968)—on which petitioner relies (Pet. 36)[5]—the court in this case did not place such emphasis on this instruction that it could have coerced the jury to reach a verdict. Considering the totality of the jury's deliberations and the court's instructions (*United States* v. *Park*, 424 U.S. 658 (1975)), there is no basis for a conclusion that the single *Allen* charge in this case coerced the will of any juror to reach a verdict.[6]

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[5]Petitioner misstates the facts in *Harris* by suggesting that the expense of trial was mentioned only once by the trial judge in that case (Pet. 36). The expense of the proceeding was referred to several times during the course of supplemental instructions in *Harris*. See 391 F. 2d 351-353.

[6]Unlike *United States* v. *Coast of Maine Lobster Co.*, 557 F. 2d 905 (1st Cir.), cert. denied, 434 U.S. 862 (1977), where the trial judge asked the jury on three occasions whether it could arrive at a verdict within an hour, the judge in this case never stated or implied that a verdict must be reached, much less that it be reached within a specified time.

4. Finally, petitioner contends (Pet. 39-46) that he was denied a fair trial by the court's refusal to exclude for cause three prospective jurors at voir dire. None of these individuals in fact served on the jury because petitioner exercised peremptory challenges to exclude them. Petitioner's theory appears to be that he was prejudiced because this reduced the number of peremptory challenges he had available to apply against other prospective jurors (Pet. App. A6-A7).

The trial court properly refused to exclude the three jurors for cause. During voir dire, the first prospective juror—Glantz—stated that he remembered hearing the name Giacalone in a criminal context 10 to 12 years earlier and further stated that he would listen to the evidence at trial and that he prided himself on being fair (CA App. 184-187). The second—Noffert—stated that he had formerly been employed by a finance company that had transacted business with petitioner, that there was no problem with petitioner's loan account, and that he could be a fair and impartial juror (*id.* at 190-191). The third—Gray—stated that she would base her decision in the case on the facts at trial and that her "feeling" that petitioner was associated with criminal activity would not affect her judgment as a juror (CA App. 41). All three of the prospective jurors stated that they had no knowledge of the incident that was the subject of the instant case.

The record at voir dire reflects that these individuals lacked any hostility or preconceptions toward petitioner that could not be laid aside in reaching a fair verdict. *Murphy* v. *Florida*, 421 U.S. 794, 800 (1975). It was therefore not an abuse of the court's discretion to refuse to exclude the jurors for cause. *United States* v. *Gay*, 522 F. 2d 429, 432 (6th Cir. 1975); *United States* ex rel *Stickler* v. *Tehan*, 365 F. 2d 199 (6th Cir. 1966),

cert. denied, 386 U.S. 992 (1967). As the court of appeals stated in this case (Pet. App. A8, A11):

> No predisposition to convict is evident in the answers and in fact the very candor of the jurors, taken with skillful handling by the trial court, may well have produced in them a greater receptivity to accord Giacalone a fair trial than might have resulted had they had no information at all or not been questioned.
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> The trial court enjoys a superior perspective as to which alleged prejudices are real and which are imagined, and its judgment must ordinarily be respected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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